

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1399
77-1400

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,
against

ANDREW DINKO, a/k/a Kelly,
PATRICIA DINKO, a/k/a Patricia Mushington,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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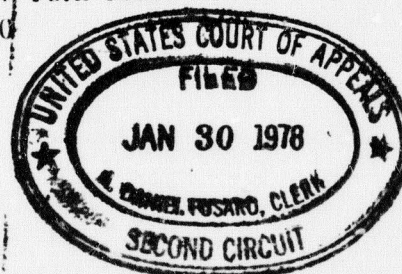


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 77-1399 and 77-1400
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UNITED STATES OF AMERICA,

Appellee,

-against-

ANDREW DINKO and PATRICIA DINKO,

Appellants.

-----x
PETITION FOR REHEARING
AND PETITION FOR REHEAR-
ING EN BANC

TO THE HONORABLE CIRCUIT JUDGES MOORE, SMITH and
MANSFIELD:

The petitioners, ANDREW DINKO and PATRICIA DINKO, jointly and severally, respectfully request this Court, and this Panel in particular, to grant a rehearing with respect to its decision and order of January 17, 1978, wherein it affirmed the judgments of the District Court for the Eastern District of New York, convicting each appellant of distributing a controlled substance and of a conspiracy to do so, in violation of 21 U.S.C. §841(a)(1) and 846, after trial before Costantino, J., and a jury.

The defendants-appellants, petitioners herein, incorporate by reference the briefs filed upon the original appeal herein.

The appellants herein have retained counsel to determine whether this Panel would grant a rehearing and reargument and whether any Judge of this Court would wish to reconsider and rehear this matter en banc.

Present counsel was not in Court when the decision of affirmance was rendered from the Bench. The appellants, however, have informed counsel that this Court was concerned about certain aspects of the record and indicated that the prosecutor came pretty close to committing reversible error, particularly in his final argument.

In addition, the appellants maintain that appellate counsel who argued the appeal did not bring up all of the matters in the record, which indicate inadequacy and ineffectiveness of trial counsel.

REASONS FOR GRANTING
A REHEARING

1. We have previously declared that the original appellate briefs are incorporated by reference herein. Trial counsel, namely Mr. Quagliata, represented both

appellants. This, in itself, we maintain, was prejudicial, especially since Mrs. Dinko took the stand and Mr. Dinko did not. It is obvious that completely different considerations necessarily had to be given, vis-a-vis trial strategy, to the respective defendants, in view of the fact that one would testify and the other would not. Necessarily, counsel could not stand Janus-faced and look both ways at two different considerations at the same time.

2. A perusal of the docket entries in the appendix submitted upon the original appeal confirms the statement of the defendants that trial counsel was so inadequate that no motions were made prior to the trial and apparently no motion was made to set aside the verdict. Moreover, the jury was not even polled.

3. Apparently there was electronic surveillance of some sort conducted in the case at bar, but no motion for suppression or any other motion addressed to it was made by trial counsel.

We would call this Court's attention to the recent case of PEOPLE v. RAMOS, 53 App.Div.2d 703, 385 N.Y.S.2d 111 [2d Dept., 1976], where the State Appellate Court reversed a conviction for possession of a controlled

substance because retained counsel was so inadequate as to have deprived the defendant of a fair trial. There, the Appellate Division observed:

"Even assuming some rationale existed for not making a pre-trial motion to suppress evidence on the ground of a Fourth Amendment violation, such a defense most certainly should have been advanced at the trial (see BRUBAKER v. DICKSON, 9 Cir., 310 F.2d 30, 38; PEOPLE v. BENNETT, 29 N.Y.2d 462, 466, 329 N.Y.2d 801, 803, 280 N.E.2d 637, 638)."

The Court continued:

"The trial court's efforts to assist the defense were not sufficient to overcome the patent insufficiency of the representation and to insure defendant his fundamental constitutional right to a fair trial (see PEOPLE v. LABREE, 34 N.Y.2d 257, 260, 357 N.Y.S.2d 412, 414, 313 N.E.2d 730, 731). We conclude that this is one of those rare cases in which the representation was so inadequate and ineffective as to have deprived defendant of a fair trial (see PEOPLE v. BENNETT, supra, 29 N.Y.2d p. 464, 329 N.Y.S.2d p. 802, 280 N.E.2d p. 637)."

While the RAMOS case is a State appellate decision, the similarity is striking. That Court cites, with approval, BRUBAKER v. DICKSON, 310 F.2d 30, 37, 38, where the 9th Circuit aptly observed:

"Due process does not require
'errorless counsel *** but counsel
reasonably likely to render and
rendering reasonably effective
assistance.'" (Emphasis ours).
Cf. UNITED STATES v. HANDY, 203
F.2d 407; 23 C.J.S. Criminal Law
§982(8).

This Court, in its oral opinion, apparently
felt the errors recited were not substantial enough to
warrant reversal. The New York Court of Appeals, in
PEOPLE v. BYRNE, 17 N.Y.2d 209, 270 N.Y.S.2d 193, aptly
explained:

"The right to have the assistance of
counsel was held to be too fundamental
to be made to depend upon nice calcula-
tions by courts of the degree of
prejudice arising from the denial."

4. We submit that this Court did not appreciate
the fact that only Mr. Salvatore Quagliata represented the
defendants. While the name Thomas A. Manning, Esq. is
mentioned as one of the attorneys for the defendant, it
is manifest that only Mr. Quagliata conducted the defense.
Thus, we ask this Court to reflect and to determine whether
it may have mistakenly assumed that separate counsel were
representing each defendant.

We realize that the rule in this Court is
still governed by the so-called "mockery of justice"

standard. Nevertheless, we maintain that this Court should determine en banc whether the criteria for proper representation by counsel, as enunciated by other Circuits, should be applied in the Second Circuit.

Judge Oakes of this Circuit dissented in RICKENBACKER v. WARDEN, 550 F.2d 62, 68. The standard set forth by the District of Columbia Circuit in UNITED STATES v. DECOSTER, 487 F.2d 1201, 1202, is instructive, and we maintain, should be adopted by this Circuit. There, the Court proclaimed:

"In this regard we are mindful that there have been several important developments since Bruce. The test there, with its requirement of a 'heavy burden' to show 'unfairness', appears to rest on the theory that an ineffectiveness claim is grounded in the due process clause. Since then, however, the Supreme Court has implied and this court has explicitly held that effective assistance, like the right to counsel itself derives not only from the due process clause, but from the sixth amendment's 'more stringent requirements'. Consistent with this recognition the Court has continued to repeat that the purpose of counsel is to 'preserve the adversary process' and that counsel must act 'in the role of

an active advocate in behalf of his client'. In the guilty plea context, the Court has held that the accused's right to effective assistance is the right to 'reasonably competent' representation. And the Third, Fourth, and Fifth Circuits have already realized that there is no reason to require less when the accused does not plead guilty. Accordingly, we adopt the following standard: a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." (Footnotes omitted)

We ask that this Panel consider the adoption of the DE COSTER standard for the Second Circuit. We urge that en banc consideration be given to this matter, as we do with respect to our other Points as well.

5. In the opening, defense counsel stated that neither of the defendants, husband and wife, has ever had any prior confrontation with the law, and neither had been convicted of a crime. At page 24 of the record, which, unfortunately, was not sufficiently emphasized previously, the defense counsel prognosticated for the jurors that ". . . We'll tell you exactly what happened from the mouth of the defendants." (A13). Thus, the defense counsel told the jurors that both defendants

would testify, and ends up calling only Patricia Dinko to the stand.

Since both had been promised to the jurors as witnesses, it was incredible that this promise should not have been fulfilled. The jurors could only have assumed that Andrew Dinko could not expose himself to cross-examination. This is puzzling, since neither had been convicted of a crime, and both apparently wanted to testify.*

Moreover, the Court itself stated that the evidence as to Mr. Dinko ". . . is kind of barren of any direct testimony, although there is some circumstantial evidence . . . " (SM657).

The prosecutor claimed there was some direct evidence, but Andrew Dinko failed to testify, despite his promise. The jury necessarily had to be suspicious.

*Indeed, appellants have informed counsel that they had character and alibi witnesses available, but trial counsel refused to call them.

6. The main brief on appeal gives more detail and cases with respect to several aspects which we have adverted to in this petition. The overall circumstances, however, of not even making motions prior to trial; not setting aside time to make pretrial applications for suppression; not moving to set aside the verdict; placing one defendant on the stand and not the other, despite a promise to call them both; and the need to change the rule on adequacy of counsel in this Circuit, should impel this Court to grant a rehearing.

PETITION FOR REHEARING
EN BANC

In the event this Panel ultimately adheres to its present decision, we ask that the original briefs and this petition be circulated among the active Judges to determine whether a rehearing en banc should be granted.

Respectfully submitted,

Irving Anolik
IRVING ANOLIK,
Attorney for Defendants-
Appellants.

CERTIFICATION

I, IRVING ANOLIK, a member of the bar of this Court, certify that this petition for rehearing is submitted in good faith and not for the purpose of delay.

DATED: January 27, 1978.

Irving Anolik
IRVING ANOLIK

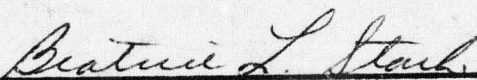
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

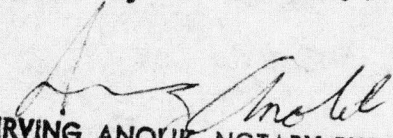
BEATRICE L. STARK, being sworn, says:

I am not a party to this action; I am over 18 years of age; I reside at Queens, N.Y.

On January 30, 1978, I served the within Petition for Rehearing, etc., upon United States Attorney for the Southern District of New York, the attorney for Appellee in this action, at One St. Andrew's Plaza, New York, New York 10007, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


BEATRICE L. STARK

Sworn to before me this
30th day of January, 1978.


IRVING ANOLIK, NOTARY PUB.
New York 0079900 Rockland
Com. Expires March 30, 1979

